ABDUL WAHAB MAT RASHID v. JURUTERA DAERAH JABATAN KERJA RAYA DAERAH KUALA KANGSAR & ORS

HIGH COURT MALAYA, TAIPING
NOOR RUWENA MD NURDIN JC
[CIVIL APPEAL NO: AB-11BNCVC-1-07-2023]
22 AUGUST 2024

Abstract – *A statutory duty of care does not mean that there exists an automatic duty in common law by the relevant authority towards the body or class of persons the statute is intended for. Where the authority has done a positive act to the highway to create a danger, for example, if something is installed on the highway which inadvertently caused the accident, a common law duty arises, in accordance with the ordinary principles of tort law. Without the positive act by the authority, a plaintiff cannot plead the common law duty of care for omission by the authority.*

TORT: *Negligence – Statutory duty – Claim by accident victim for breach of statutory duty – Accident caused by fallen trees and/or electricity poles – Claim against Jabatan Kerja Raya for failure to carry out maintenance work and breach of statutory duty of care – Whether trees and/or electricity poles brought down by landslide or overhanging branches – Whether danger caused by natural cause – Whether elements for negligence and breach of duty of care established – Whether burden of proof discharged*

It was rainy and dark night when the plaintiff ('SP2') was riding his motorcycle at about 7.50pm from his house in Kampung Kubang Pekan, Kuala Kangsar towards his workplace at R&R Sg Perak. The plaintiff's shift was to commence at 8pm until 8am the following day. All of a sudden, he saw an obstruction on the road and the next thing he knew, he was in the hospital. Later, the plaintiff, who did not remember how the accident happened because he had lost consciousness, was informed that his motorcycle had hit a fallen electricity pole on the said road. As a result of the accident, the plaintiff sustained: (i) cerebral concussion; (ii) left pneumothorax with flail chest; (iii) left third, fifth to tenth rib fracture; (iv) open fracture left first metatarsal; (v) closed left clavicle fracture; and (vi) anaemia induced acute coronary syndrome. The plaintiff's pleaded cause of action against the first defendant, the engineer of Jabatan Kerja Raya ('JKR'), was for negligence in the maintenance of trees and/or electricity poles along the road, particularly at KM 23 Jalan Kuala Kangsar-Sayong-Tanjung Blanja, the road which he used on a daily basis to get to work, and to take reasonable safety measures to ensure the safety of users of the road,

especially the plaintiff. Further or alternatively, it was averred that the first defendant and/or its workers, agents had breached their statutory duty to maintain the trees and/or electricity poles near KM 23 of the said road so that the trees would not have fallen and hit the electricity poles, causing them to break and fall across the road and endangering road users, especially the plaintiff. The Magistrate found that the plaintiff had failed to prove his case on a balance of probabilities and hence, this appeal. The grounds of appeal were: (i) judicial misappreciation of the totality of evidence adduced by the plaintiff; (ii) application of the principle of *res ipsa loquitor*; (ii) negligence and/or breach of statutory duty of care by the defendant(s) to maintain public roads; (iv) wrong burden of proof imposed upon the plaintiff by requiring him to call an expert on soil condition; and (v) whether the defendants could rely on s. 7 of the Government Proceedings Act 1956 to escape liability.

Held (dismissing appeal with no order as to costs):

(1) The possibility of the plaintiff riding his motorcycle at 60-70km/h could not be discounted. Although it was dark and rainy, the plaintiff, who was very familiar with the road, did not want to be late to work and embarked on his motorcycle with its light switched on. If he was really going very slowly, at 25km/h, as he claimed, he would have been able to brake early enough to avoid the obstruction on the road, which was most likely the fallen trees and/or electricity poles. It was more probable than not that the plaintiff was riding more than 60-70km/h that night despite the unfavourable weather and road condition and he had contributed to the accident which befell him. The Magistrate had carefully considered all the evidence and made the correct findings of fact as well as raised some valid legal issues and hence there was no merit in the first issue. (paras 26-28)

(2) *Res ipsa loquitor* has no application in this case because all the facts were known to enable explanation of the cause of the accident which befell the plaintiff. The plaintiff had not discharged the burden of proof when the doctrine or maxim of *res ipsa loquitor* is dependent on the absence of any explanation for the accident. The plaintiff did not know what happened in the accident because he passed out but that did not take away the legal burden from the plaintiff. The facts of the case did not support the application of the maxim of *res ipsa loquitor*. The accident was caused by the landslide which brought down the trees from the hillslopes and not due to some fallen overhanging branches. The magnitude of the landslide showed that the causation was something more substantive and the plaintiff bore the burden to explain the causation rather than the defendants. (paras 33-35)

(3) A distinction has to be drawn between a permanent danger due to want of repair and a transient danger. The hillslopes were not a permanent danger due to want of repair, but could be categorised as a transient danger as landslides had never occurred in that area prior to the incident. Neither was there any evidence that the third party and/or the second defendant had installed something on the highway which inadvertently caused the accident. This case did not involve a highway authority. Although one of the defendants named by the plaintiff was JKR, which had been tasked with the management of public roads within the state, the slopes were located on a private land and not within the JKR's road reserve. Further, it was the landslide that had caused the electricity poles to fall and not due to the trees falling upon the poles. The evidence presented to that effect had not been challenged by the plaintiff. (paras 40-42)

(4) The company was responsible for emergency works such as this incident where they needed to respond within one hour after receiving notification of an incident. Therefore, the company would only be 'liable' if it arrived later than one hour after receiving notification and an accident had occurred within that one hour and the company had not yet managed to conduct emergency works. The facts that the company's team arrived within one hour of the notification by JKR, were not challenged. All clearing works were completed within 24 hours of the landslide. The plaintiff had not proved on a balance of probabilities, the elements for negligence that the defendants and the third party owed him a duty of care and neither had they breached their duty of care. The plaintiff could not establish a nexus or special relationship with the defendants and the third party such that would give rise to a duty of care towards him. Neither had JKR been shown to have created the tort which caused the plaintiff to suffer injuries and damages. (paras 44, 46 & 48)

(5) The biggest 'danger' on the said road that day was the fallen electricity pole and the power lines were still live. It was Tenaga Nasional Bhd's responsibility to cut the power supply to the fallen electricity poles and only then could the third party commence its task to clear the road of fallen trees and debris. The danger was due to natural causes and therefore, the defendants could not be blamed for the accident. The defendants could rely on s. 7 of the GPA to avoid liability. (paras 49 & 56)

(6) The burden of proof in an action for negligence lies with the plaintiff. Technical issues are to be considered by the courts in light of the expert opinion; and for a witness to be considered an expert witness, he or she must be truly independent and skilled in the area he or she is giving

A evidence on. The plaintiff did not call any expert witness to give evidence in respect of the landslide. Without such expert evidence, the irresistible conclusion would be that the plaintiff had failed to discharge the burden of proof. Hence, there was no merit in this issue. (paras 57 & 58)

B **Case(s) referred to:**

Ahmad Jaafar Abdul Latiff v. Dato' Bandar Kuala Lumpur [2014] 9 CLJ 861 FC ***(foll)***
Anns v. Merton London Borough Council [1978] AC 728 ***(refd)***
Baker v. Quantum Clothing Group [2011] 1 WLR 1003 ***(refd)***
Barkway v. South Wales Transport Co Ltd [1950] 1 All ER 392 ***(refd)***
Batang Kali Estates Sdn Bhd v. Romani Abdul Aziz [1995] 3 CLJ 836 HC ***(foll)***
C *British Road Services v. Slater [1964] 1 All ER 816* ***(refd)***
Burnside & Anor v. Emerson & Anor [1968] 1 WLR 1940 ***(refd)***
Chong Sow Ying & Anor v. Official Administrator [1983] CLJU 44; [1983] 1 LNS 44 HC ***(refd)***
Dalip Bhagwan Singh v. PP [1997] 4 CLJ 645 FC ***(refd)***
D *Dr Kok Choong Seng & Anor v. Soo Cheng Lin & Another Appeal [2017] 10 CLJ 529 FC* ***(refd)***
Edwards v. National Coal Board [1949] 1 KB 704 ***(refd)***
Francis Okechukwu Nwankwo v. PP & Another Appeal [2022] CLJU 2649; [2022] 1 LNS 2649 CA ***(foll)***
Gan Yook Chin & Anor v. Lee Ing Chin & Ors [2004] CLJ 309 FC ***(refd)***
E *Gorringe v. Calderdale Metropolitan Borough Council [2004] 1 WLR 1057* ***(refd)***
Hu Sepang v. Inspector Keong On Eng & Ors [1991] 2 CLJ 999; [1991] 2 CLJ (Rep) 739 HC ***(refd)***
Khairun Nizad Daud & Anor v. Juprin Paul [2018] 9 MLJ 32 ***(refd)***
Lembaga Kemajuan Tanah Persekutuan v. Mariam Mangu & Ors [1984] 1 CLJ 225; [1984] 1 CLJ (Rep) 197 FC ***(refd)***
F *Len Omnibus Co Bhd v. North South Transport Sdn Bhd & Anor And Another Appeal [1978] CLJU 96; [1978] 1 LNS 96 FC* ***(refd)***
Munusamy Vengadasalam v. PP [1987] 1 CLJ 250; [1987] CLJ (Rep) 221 SC ***(foll)***
Ng Chul Sia v. Maimon Ali [1982] CLJU 95; [1982] 1 LNS 95 HC ***(refd)***
Noorianti Zainol Abidin & Ors v. Tang Lei Nge [1990] 1 CLJ 943; [1990] 2 CLJ (Rep) 545 HC ***(refd)***
G *Parimala Muthusamy & Ors v. Projek Lebuhraya Utara-Selatan [1997] 4 CLJ 54 HC* ***(dist)***
Projek Lebuh Raya Utara-Selatan Sdn Bhd v. Kim Seng Enterprise (Kedah) Sdn Bhd [2013] 6 CLJ 958 CA ***(refd)***
Rasidin Partojo v. Frederick Kiai [1976] CLJU 123; [1976] 1 LNS 123 FC ***(refd)***
H *Raymond Cheah Choon Sing v. Jurutera Daerah, Jabatan Kerja Raya Seberang Perai Tengah & Ors [2017] 9 CLJ 543 CA* ***(dist)***
Sajid Dilwarkhan v. Ketua Pengarah Jabatan Kerja Raya & Ors [2020] CLJU 2188; [2020] 1 LNS 2188 HC ***(dist)***
Scott v. London & St Katherine Docks Co [1861-73] All ER 246 ***(refd)***
Tengku Dato' Ibrahim Petra Tengku Indra Petra v. Petra Perdana Bhd & Another Appeal [2018] 2 CLJ 641 FC ***(refd)***
I *X (Minors) v. Bedfordshire County Council [1995] 3 All ER 353* ***(refd)***

Legislation referred to:
Evidence Act 1950, s. 114(g)
Government Proceedings Act 1956, s. 7

For the plaintiff/appellant - Selvadoray Thandanyan; M/s Selvadoray & Co
For the defendants/respondents - Mohd Fitri Sadarudin; SFC

Reported by S Barathi

JUDGMENT

Noor Ruwena Md Nurdin JC:

Introduction

[1] The parties in this appeal will be referred to as they were at the Magistrates' Court, for ease of reference. The appeal by the plaintiff was against the whole decision of the learned Magistrate delivered on 20 June 2023 where he found that the plaintiff had failed to prove his case on a balance of probabilities. The notice of appeal to the High Court was filed on 3 July 2023.

[2] Pursuant thereto, on 9 January 2024 this court heard the appeal and reserved judgment. Then on 16 February 2024, I delivered judgment wherein I had upheld the decision of the learned Magistrate with no order as to costs. Dissatisfied with the court's decision, the plaintiff had on 19 June 2024 obtained from the Court of Appeal leave to appeal against my decision. The notice of appeal was filed on 26 June 2024. I now give my reasons in this grounds of judgment for dismissing the appeal.

Issues In The Appeal

[3] The memorandum of appeal in Rekod Rayuan Jilid 1 (pp. 16 to 21) listed 15 grounds of appeal whereas the supplemental memorandum of appeal in the Rekod Rayuan Tambahan (pp. 31 to 40) contained another 23 grounds of appeal. Nevertheless, the court noted that they were mostly repetitious and the plaintiff submitted roughly on seven issues as follows:

(i) the learned Magistrate was wrong in concluding that the plaintiff did not know what his motorcycle had hit despite finding that an accident had occurred on that road;

(ii) judicial misappreciation of the investigating officer's evidence that he did not immediately investigate the accident;

(iii) the learned Magistrate was wrong to conclude that the plaintiff was not wearing a helmet at the material time;

(iv) breach of duty of care by the defendants and duty to maintain public roads;

(v) the learned Magistrate was wrong to conclude that the accident was an "act of God" when the principle of "*res ipsa loquitor*" applied in this case;

(vi) the learned Magistrate was wrong to impose a higher burden of proof on the plaintiff in regard to the non-calling of an expert on soil condition; and

(vii) whether the defendants could rely on s. 7 of the Government Proceedings Act 1956 to escape liability.

Facts Of The Case

[4] On 4 December 2018 at about 7.50pm, the plaintiff (SP2) was riding his motorcycle bearing registration number AGK 6005 from his house in Kampung Kubang Pekan, Kuala Kangsar towards his workplace at R&R Sg Perak, approximately five minutes away from home. On that fateful day, the plaintiff's shift was to commence at 8pm until 8am the following day. It was rainy and dark that night as the plaintiff was travelling along KM 23 Jalan Kuala Kangsar - Sayong - Tanjung Blanja, a road which he used on a daily basis to get to work. Alas, all of a sudden, he saw an obstruction on the road and the next thing he knew, he was in hospital! Later, the plaintiff was informed that his motorcycle had hit a fallen electricity pole on the said road. He lodged a police report on 24 January 2019 and then another police report on 26 January 2019 to correct the date of accident in the first police report which he stated as 6 January 2019.

[5] The plaintiff was given medical leave from 5 December 2018 to 13 March 2019 as he had sustained the following injuries as a result of the accident:

(i) cerebral concussion;

(ii) left pneumothorax with flail chest;

(iii) left third, fifth to tenth rib fracture;

(iv) open fracture left first metatarsal;

(v) closed left clavicle fracture; and

(vi) anaemia induced acute coronary syndrome.

[6] The plaintiff claimed that he was wearing a helmet at that time.

Evaluation And Findings Of The Court

[7] The plaintiff in his statement of claim pleaded that the cause of action was the first defendant's negligence in the maintenance of trees and/or electricity poles along the said road, particularly at KM 23 and to take reasonable safety measures to ensure the safety of users of the road, especially the plaintiff.

[8] Further or alternatively, it was averred that the first defendant and/or its workers, agents had breached their statutory duty to maintain the trees and/or electricity poles near KM 23 of the said road so that the trees would not have fallen and hit the electricity poles causing them to break and fall across the road and endangering road users, especially the plaintiff. The particulars of the negligence and breach of duty of care can be found in pp. 31 to 32 of the Rekod Rayuan Jilid 1.

[9] In the case of *Projek Lebuh Raya Utara-Selatan Sdn Bhd v. Kim Seng Enterprise (Kedah) Sdn Bhd* [2013] 6 CLJ 958; [2013] 5 MLJ 360, the Court of Appeal stated:

> [67] Negligence is a tort and three things must be proved to support the claimant's claim:
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> (a) that the defendant owes the claimant plaintiff a duty of care;
>
> (b) that the defendant is in breach of that duty of care; and
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> (c) that the claimant plaintiff suffers damage as a result of that breach of duty and that damage is not too remote.
>
> [68] According to Alderson B in *Blyth v. Birmingham Waterworks Co* (1856) 11 Exch 781, p 784:
>
> > Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.
>
> [69] The standard of conduct to determine negligence is that of the reasonable man. It is an objective test.

[10] In regard to the tort of breach of statutory duty, I refer to the case of *Hu Sepang v. Inspector Keong On Eng & Ors* [1991] 2 CLJ 999; [1991] 2 CLJ (Rep) 739; [1991] 1 MLJ 440 where Lim Beng Choon J stated that "... It has been said that to establish civil liability for a breach of statutory duty the plaintiff must show that: (a) the injury he has suffered is within the ambit of the statute, (b) the statutory duty imposes a liability to civil action, (c) the statutory duty was not fulfilled, and (d) the breach of duty has caused his injury ...". The learned judge continued further that "... a statute may impose a duty towards persons generally in which case no question can arise of whether the plaintiff is within the class protected. Furthermore, it is also necessary to bear in mind that where a statute confers power coupled with a duty to exercise it, failure to do so is a breach of that duty for which a remedy will lie." This followed the principle propounded in the English case of in *X (Minors) v. Bedfordshire County Council* [1995] 3 All ER 353 per Lord Browne-Wilkinson who is stated:

A The basic proposition is that in the ordinary case a breach of statutory duty does not, by itself, give rise to any private law cause of action. However, a private law cause of action will arise if it can be shown, as a matter of construction of the statute, that the statutory duty was imposed for the protection of a limited class of the public and that Parliament intended to confer on members of that class a private right of
B action for breach of the duty ... .

[11] Those are the positions of the law on negligence and breach of statutory duty. It is also trite law that an appellate court would be slow to disturb the findings of the trial court unless it is convinced that there have been substantial misdirection of facts and law which merited appellate
C intervention. The appellate court will examine the process of evaluation of the evidence by the trial court. A decision arrived at by a trial court without or insufficient judicial appreciation of the evidence may be set aside on appeal. This is consistent with the established "plainly wrong" test: *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] CLJ 309. Hence, regardless of any
D number of grounds raised in the memorandum of appeal, the duty of the appellate court in a civil appeal is to determine whether the appellant has proved his case on a balance of probabilities.

[12] It is also trite that the trier of fact would have had the benefit and advantage of seeing and hearing the witnesses and the opportunity to assess
E their demeanour: *Rasidin Partojo v. Frederick Kiai* [1976] CLJU 123; [1976] 1 LNS 123; [1976] 2 MLJ 214. He or she would have had a first-hand opportunity to evaluate and appraise the evidence of the witnesses. Should this court now set aside the decision of the learned Magistrate for not allowing the plaintiff's claims on the main ground that he had not proved his
F case on a balance of probabilities and that the wrong party(s) had been sued at the Magistrates' Court?

[13] I have summarised further the issues brought up during the appeal by the plaintiff as some of them overlap. The grounds can be categorised as follows:

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(i) judicial misappreciation of the totality of evidence adduced by the plaintiff;

(ii) application of the principle of "*res ipsa loquitor*";

H (iii) negligence and/or breach of statutory duty of care by the defendant(s) to maintain public roads;

(iv) wrong burden of proof imposed upon the plaintiff by requiring him to call an expert on soil condition; and

I (v) whether the defendants could rely on s. 7 of the Government Proceedings Act 1956 to escape liability.

Judicial Misappreciation Of The Totality Of Evidence Adduced By The Plaintiff A

[14] SP1 was the investigation officer assigned to the plaintiff's case. He testified that he had visited the site of the accident with the plaintiff after the report was lodged (more than six weeks after the accident happened). He drew up the sketch plan (exh. P1) and took photographs of the accident site and the plaintiff's motorcycle. SP1 determined the possible site of the B accident based on the pattern of the spreading sand which still looked quite new. According to this witness, the cause of the fallen trees was due to a landslide at the hillslopes which their distance to the side of the road was about 2.5 metres (prior to the landslide). The branches of the trees on the hillslopes appeared to be 'overhanging' above the side of the road. When he C commenced investigation, the motorcycle had already been repaired. The area was under the jurisdiction of Jabatan Kerja Raya Kuala Kangsar. He said that the accident site had been cleared off the debris possibly by the Bomba and few other Government agencies, as per the photographs tendered. The only report he received on the accident was from the plaintiff. No other D (legal) action had been taken against anyone else pursuant to his investigation. SP1 had also marked X on the photograph to show where the fallen trees were after the landslide.

[15] In cross-examination, SP1 stated that he only took the plaintiff's statement. He said he was not sure how fast the plaintiff was travelling that E night but the speed limit there was 90 km/h. He agreed that if the plaintiff had been riding at a low speed he would have been able to control his motorcycle while passing the area. Although the road was relatively straight and if one rode slowly, he said if something happened suddenly, one may not be able to brake in time. He did not investigate the obstruction as claimed F by the plaintiff. He assumed that the area was cleared by the JKR. SP1 also did not investigate the weather condition or the landslide despite the plaintiff's claim. Neither did he investigate whether there was any warning signs put up that night after the landslide.

[16] SP1 was not sure whether there were other vehicles involved in the G accident which happened around 7pm (based on the plaintiff's statement) and he did not investigate the actual time of the accident. He was also not sure if the plaintiff had switched on the motorcycle lights. But SP1 agreed that since the road was fairly straight and if the plaintiff had switched on his motorcycle lights, he would have been able to see if there was any H obstruction on the road. He also agreed as the road was by the hillslopes, one had to drive carefully there. In respect of the plaintiff's helmet, SP1 stated that he did not investigate further since the plaintiff claimed he was wearing it. SP1 also agreed that he was not able to determine the cause of the accident as he based it only upon the plaintiff's report. SP1 told the court that he did I not investigate the owner(s) of the land where the landslide occurred nor did

A he investigate the cause of the landslide, the fallen electricity poles or who was responsible for the fallen poles. He agreed that he should have investigated these but he did not do so. He was also not sure when the landslide occurred prior to the plaintiff's accident.

B **[17]** From the learned Magistrate's grounds of judgment, he was not impressed with SP1's investigation of the case. And I have to agree with his findings on SP1's investigation, or rather the lack of it. Although SP1 went to the accident site more than six weeks after the accident, he should have conducted a more thorough investigation where he could have investigated the adjacent land and their owner(s). This was important because the question C of who owned the fallen trees and/or electricity poles would have pointed him in the right direction as to which party should bear the responsibility, if any, in respect of the plaintiff's claim. The plaintiff contended this was an irrelevant issue but I will elaborate on this further later in this grounds of judgment. I noted that the learned Magistrate had duly considered and D discussed SP1's evidence in paras. 18 to 22 of the grounds of judgment.

[18] The plaintiff was SP2. He admitted in cross-examination that on that night he was riding his motorcycle at a speed of 60-70km/h but he did not go fast. He denied that he was not wearing a helmet at that time. He was not able to prove the damages to the motorcycle as it had already been repaired E and he lost the receipt. He did not manage to obtain a copy of the receipt as it was too long ago. He said he did ask for it from the workshop in Chandan Puri. He did not remember how the accident happened because he lost consciousness. He admitted that he did not know what he had collided into. He was told by his family members about what purportedly happened F that night.

[19] In the cross-examination by the third-party's counsel, the plaintiff told the court that he never made any report about any land erosion there although he used the said road on a daily basis. This was because there had never been any such erosion there. An interesting question was in regard to G his admission that he was going to work at that time and it would take him about five minutes to get to the R&R Sg Perak from his home, that it was about 7.50pm when he left home. He told the court that if he was late to work, "supervisor akan bising".

H **[20]** The plaintiff was asked and he agreed that the electricity poles fell because of the landslide; therefore, the landowner should be responsible to ensure the safety of the hillslopes. The plaintiff replied that he did not know. In re-examination, the plaintiff stated that it was dark and he saw an obstruction on the road but he could not tell what it was. He said he was riding at 25km/h (and in examination-in-chief). Obviously, there was a I material contradiction in his evidence about the speed at which he was riding his motorcycle when he said he was riding at 60-70km/h.

[21] It would be pertinent to consider the evidence of SP3 who was at the accident site that night. According to SP3, he was in the police MPV on 4 December 2018 together with his colleague on the 2pm to 10pm shift. At about 7pm, he received instructions from the Pusat Kawalan Daerah to head to Jalan Tanjung Blanja near Kampung Kubang Pekan as some fallen trees were obstructing the road. He arrived at the said location at 7.20pm and a number of villagers were already there but they could not do anything as the fallen trees had blocked traffic on the road on both sides and it was still raining. He informed the control centre about the situation and the latter contacted the Civil Defence Department (CDD) and Bomba for their assistance. No other Government agency representative was there at that point of time.

[22] SP3 said it was dark as there was no light around and he put on the MPV's beacon light and gave early warning to possible oncoming traffic. After the control centre was alerted of the situation, then the representatives from the CDD, Bomba and an ambulance arrived, respectively. They immediately set to work to cut the trees that obstructed traffic. SP3 requested the control centre to get in touch with TNB to disconnect the electricity supply there. It was then that he heard shouts from the villagers that there was an accident behind the fallen trees. The court noted that SP3 saw the plaintiff was wearing a helmet at that time. An ambulance service was called. He saw the victim was unconscious on the road and they gave emergency assistance to the victim. He was later sent to the hospital in an ambulance. After the Bomba came, SP3 saw representatives from the third party had arrived there at about 9pm with their tractor and machineries to conduct clearing works.

[23] SP3 estimated that the time was 7.50pm when he heard shouts from the villagers (discovery of the plaintiff behind the trees). He was asked by the third party's counsel that the accident involving the plaintiff had occurred just a few minutes after the landslide to which he disagreed. He said that the accident just happened when he arrived at the scene. He told the court there was another landslide at a different location. He disagreed is that he should have controlled the traffic on both sides of the blocked road. This was because he did not want to take any risk and he had switched on the MPV's beacon light to warn oncoming traffic of the emergency at the scene. As the road was blocked, he could not get to the other side and had to pass through a nearby house to get to where the plaintiff had fallen.

[24] It was suggested to SP3 that if he had been on the other side of the fallen trees, he would have been able to control the traffic there and the accident could have been avoided and he disagreed. Then, he contradicted himself and agreed the accident could have been avoided if he had been on the plaintiff's side of the road (from the direction of Tanjung Blanja) controlling the traffic. In re-examination, SP3 said he was unsure if the accident could have been avoided.

[25] The plaintiff's counsel submitted that it was unreasonable for the learned Magistrate to expect SP1 to investigate whether there were other witnesses when he had already made a finding that an accident occurred involving the plaintiff, that SP3 said the victim was wearing a helmet and that he had sustained injuries due to the accident. Since the medical report showed there were no injuries to the plaintiff's face, it must be true then that he was wearing a helmet at the material time. It was submitted further that the Magistrate's findings that hundreds of vehicles must have passed on the said road were not supported by any evidence. The plaintiff further submitted that the learned Magistrate had failed to consider the overall evidence but had taken SP1's evidence in isolation. Pursuant thereto, the plaintiff contended that he had prove a *prima facie* case and the defendants had a duty to disprove the plaintiff's case that they were not liable for the accident which befell the plaintiff as it was their duty to was maintain the road free from debris.

[26] Before I go on further to discuss the issues raised, I would first address the liability of the plaintiff in this case. I agreed with the findings of the learned Magistrate after going through the notes of evidence, documentary evidence and the grounds of judgment. Why did I say that the plaintiff was liable? In this regard, I was of the view that the possibility of the plaintiff riding his motorcycle at 60-70km/h could not be discounted. Although it was dark and rainy, he did not want to be late to work, he was very familiar with the road and his motorcycle light was switched on. If he was really going very slowly as he claimed, this court opined that he would have been able to brake early enough to avoid the obstruction on the road. As it was dark and he could not see well ahead of him, therefore, the obstruction on the road was most likely the fallen trees and/or electricity poles. I could not reconcile his contention of the low speed of the motorcycle (which he claimed) with the fact that he had somehow managed to run into the mass of fallen trees and poles. I said mass of fallen trees because it could be seen from the photograph in the extract of newspaper report tendered by the plaintiff that it was not just a small "blockade" on the road.

[27] On a balance of probabilities, I found that it was more probable than not that he was riding more than 60-70km/h that night despite the unfavourable weather and road condition and he had contributed to the accident which befell him. I refer to the case of *Khairun Nizad Daud & Anor v. Juprin Paul* [2018] 9 MLJ 32, where the learned JC as he then was stated:

> [32] I am in agreement that there is always a duty on road users to remain vigilant at all times as public roads are always a venue for danger, whichever time of the day or location, where one can never be entitled to take it easy and be off-guard because it is a quiet stretch of road or a time of the day where traffic volume is low.

[28] I did not find any judicial misappreciation of evidence on the part of the learned Magistrate and he was entitled to make certain inference(s) based on the evidence presented before him. The learned Magistrate had carefully considered all the evidence in his judgment and made the correct findings of fact as well as raised some valid legal issues as per paras. 27 to 36 of the grounds of judgment. Therefore, I did not find any merit on the first issue aforementioned and I did not see it fit to interfere with the factual findings of the learned Magistrate because he had given a reasoned judgment and applied the relevant laws in arriving at his decision: *Tengku Dato' Ibrahim Petra Tengku Indra Petra v. Petra Perdana Bhd & Another Appeal* [2018] 2 CLJ 641.

(ii) Application Of The Principle Of "Res Ipsa Loquitor"

[29] The maxim simply means that the thing speaks for itself. The plaintiff contended that the accident speaks for itself and no further proof was needed on the part of the plaintiff; that the negligence of the defendants caused the accident. The effect of of this maxim if successfully applied, will shift the legal burden of proof to the defendant and the defendant bears the evidential burden to provide an explanation for the accident and that there is no negligence on his part. At the end of the case, if all the probabilities are equal, then the defendant will have discharged the legal and evidentiary burden. No negligence will be imputed on the defendant. In *Scott v. London & St Katherine Docks Co* [1861-73] All ER 246, Erie CJ explained the concept as follows:

> There must be reasonable evidence of negligence, but where the thing is shewn – to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care.

[30] On the local front, the application of *res ipsa loquitor* are more often in road traffic accident cases. In *Chong Sow Ying & Anor v. Official Administrator* [1983] CLJU 44; [1983] 1 LNS 44; [1984] 1 MLJ 185, Shaik Daud J held:

> As there are no eye-witnesses to the accident and as I held that there are no explanations as to why the [the defendant's] car came across the road in the path of [the plaintiffs] car *res ipsa loquitor* must necessarily apply. As that principle applies, it is for the defence to show and somehow contradict the evidence as can be found in the sketch plan *viz* that it was [the defendant's] car which for no apparent reason encroached into the path of [the plaintiff's] car ... .

[31] The maxim is not applicable when all the facts of the case are known such that they would explain the cause of the accident. In the case of *Barkway v. South Wales Transport Co Ltd* [1950] 1 All ER 392, Lord Porter stated:

A *The doctrine is dependent on the absence of explanation,* and although it is the duty of the defendants, if they desire to protect themselves, to give an adequate explanation of the cause of the accident, *yet, if the facts are sufficiently known, the question ceases to one where the facts speak for themselves, and the solution is to be found by determining whether, on the facts as established, negligence is to be inferred or not.* (emphasis added)

B

[32] The maxim will apply when the defendant controlled or managed the things that caused the damage to the plaintiff: *Lembaga Kemajuan Tanah Persekutuan v. Mariam Mangu & Ors* [1984] 1 CLJ 225; [1984] 1 CLJ (Rep) 197; [1984] 1 MLJ 283.

C **[33]** This court opined that *res ipsa loquitor* has no application in this case because all the facts are known to enable an explanation of the cause of the accident which befell the plaintiff. There was evidence from SP3 that he went to the accident site because there was a landslide which had caused the trees and electricity poles to fall onto the road. Hence, there was an explanation for the accident. Despite the plaintiff denying it was his duty to prove this D fact, I was of the view that he had not discharged the burden of proof when the doctrine or maxim of *res ipsa loquitor* is dependent on the absence of any explanation for the accident. The plaintiff did not know what happened in the accident because he passed out but that did not take away the legal burden from the plaintiff.

E

[34] There was also evidence from SD1, an engineer of JKR, who told the court that JKR may carry out the task of cutting and trimming tree boughs and branches that endanger road users. Nevertheless, the accident was caused by the landslide which brought down the trees from the hillslopes and not F due to some fallen overhanging branches. The magnitude of the landslide showed that the causation was something more substantive and the plaintiff bore the burden to explain the causation rather than the defendants. It is no use either to raise the issue of occupier's liability submitted by the plaintiff rather belatedly as the principle has no application at all in this case. Occupier's liability is only relevant if the plaintiff as a visitor had gone into G the private property that was adjacent to the said road and sustained injuries within the property. Here, he was merely using the public road to get to his workplace. In SD1's witness statement, the witness stated:

6. Berdasarkan pengetahuan pihak JKR, kejadian tanah runtuh tersebut berpunca daripada mana?

H

Kejadian tanah runtuh tersebut berlaku disebabkan kegagalan struktur tebing atau cerun yang berada dalam kawasan lot tanah persendirian (private place) bersebelahan jalan. Insiden kejadian tanah runtuh berkenaan adalah insiden luar jangka di mana mengikut rekod ianya tidak pernah berlaku dan ianya I berkemungkinan boleh berlaku disebabkan kadar taburan hujan yang tinggi pada hari kejadian.

7. Siapakah pemilik tanah tersebut?

Berdasarkan rekod, terdapat beberapa hakmilik persendirian yang bersempadan dengan jalan raya tersebut iaitu GM 8656 Lot 11953, GM 2913 Lot 11145 dan GM 1633 Lot 6482. Berdasarkan semakan dengan pihak pentadbir tanah, kejadian tanah runtuh pada hari tersebut disahkan berlaku tetapi gagal mengenal pasti kawasan/lot yang terlibat memandangkan insiden telah lama berlaku dan sukar dikenal pasti secara terperinci.

...

20. Secara kesimpulannya, apa pandangan pihak encik terhadap tuntutan Plaintif dalam tindakan ini?

Tuntutan Plaintif di dalam tindakan ini terhadap Defendan-Defendan adalah tidak berasas kerana pihak Defendan-Defendan bukanlah jabatan yang bertanggungjawab yang menyelenggarakan pokok-pokok dan/atau tiang letrik di atau berhampiran KM 23 Jalan Kuala Kangsar - Sayong - Tanjung Blanja (Kampung Kubang Pekan) supaya pokok tidak tumbang dan merempuh tiang letrik tersebut sehingga patah dan jatuh melintang di jalan tersebut. Oleh itu, tuntutan Plaintif wajar ditolak oleh Mahkamah yang Mulia ini.

[35] I would also rely on the same evidence above in considering next the plaintiff's claim of negligence and/or breach of statutory duty. To conclude, I was not inclined to accept the plaintiff's argument that the maxim *res ipsa loquitor* was applicable in his case because the facts did not support it.

(iii) Negligence And/Or Breach Of Statutory Duty Of Care By The Defendant(s) To Maintain Public Roads

[36] In a negligence claim, the plaintiff must prove that:

(i) the defendant owed him a duty of care;

(ii) the defendant had breached the duty of care; and

(iii) the plaintiff suffered damage in consequence of that breach.

[37] Thus, did the defendants in this case, namely the District Engineer, the JKR, the State Government and the subcontractor for road maintenance, owe a duty of care to the plaintiff? The general rule in regard to local authorities is that statutory powers conferred on those authorities are capable of imposing a duty of care on local authorities: *Anns v. Merton London Borough Council* [1978] AC 728. The Federal Court in the case of *Dr Kok Choong Seng & Anor v. Soo Cheng Lin & Another Appeal* [2017] 10 CLJ 529; [2018] 1 MLJ 685 stated:

> The law of negligence is no stranger to the concept of positive duty to protect another from harm. Positive duty to guard against harm caused by a third party may arise from a special relationship between the plaintiff and the defendant, giving rise to an assumption of responsibility by the

A defendant, or where a risk or a source of danger has been created (*Smith v. Littiewoods Organisation Ltd* [1987] AC 241; *Mitchell v. Glasgow City Council* [2009] 1 AC 874.

[38] I now move to the issue of what is the standard of care in a negligence case involving a road or highway. The standard of care is only what is B reasonably foreseeable as distinction must be made between a permanent danger due to want of repair, and a transient danger due to elements which the latter is temporary in nature. In the case of *Burnside & Anor v. Emerson & Anor* [1968] 1 WLR 1940 which concerned a highway authority, the following principles were established that:

C i. The plaintiff must show that the road was in such a condition as to be dangerous for traffic, in seeing whether it is dangerous, foreseeability is essential;

ii. The plaintiff must prove that the danger was due to the failure to maintain which includes failure to repair the highway. In this regard D distinction is to be drawn between a permanent danger due to want of repair, and a transient danger due to elements. When there are potholes or ruts in a classified road which have continued for a long time unrepaired it may be inferred that there has been a failure to maintain. When there is transient danger due to elements, be it snow, ice or heavy rain the existence of the danger for a short time E is no evidence of failure to maintain; and

iii. If there is failure to maintain, whether the highway authority showed that it took all reasonable care to maintain the highway.

[39] I am mindful of the general principles in *Burnside v. Emerson* (*supra*) as F well as the law that a statutory duty of care did not mean that there existed an automatic duty in common law by the relevant authority towards the body or class of persons the statute was intended for: *Gorringe v. Calderdale Metropolitan Borough Council* [2004] 1 WLR1057, [2004] UK House of Lords 15. An exception to this would be where the authority has done a positive act to the highway to create a danger, for example, if it installed something G on the highway which inadvertently caused the accident. In such a case, a common law duty does arise, in accordance with ordinary principles of tort law. Without the positive act by the authority, a plaintiff cannot plead the common law duty of care for an omission by the authority.

H **[40]** A distinction has to be drawn between a permanent danger due to want of repair, and a transient danger due to elements as have been established in case laws: *Burnside v. Emerson* (*supra*). Diplock LJ in that is case held that "Repair and maintenance thus includes providing an adequate system of drainage for the road and it was in this respect that the judge found the highway authority had failed in their duty to maintain the highway". A I balancing exercise is required between the risk of injury on the one hand and

on the other hand, the costs/resources required to eliminate the risk, *ie*, the test of "reasonable practicability": *Edwards v. National Coal Board* [1949] 1 KB 704 and *Baker v. Quantum Clothing Group* [2011] 1 WLR 1003.

[41] In this case, the hillslopes were not a permanent danger due to want of repair, but could be categorised as a transient danger due to elements because of SD1's evidence that landslides had never occurred in that area prior to the incident. Neither was there any evidence that the third party and/or the second defendant had installed something on the highway which inadvertently caused the accident. He did say that there was a likelihood of a landslide occurring due to the rainfall. The plaintiff referred to many cases involving highway authority (namely PLUS) in support of his argument that the defendants owed him a duty of care by virtue of them being tasked with maintenance of the said road and that the damages he suffered were foreseeable. I will discuss some of the cases later. But now, strictly speaking, this case did not involve a highway authority such as PLUS but one of the defendants named by the plaintiff was JKR, which had been tasked with the management of public roads (not highways) within the state. Did there exist a special relationship between the plaintiff and the defendants and third party in this case such that would give rise to a duty of care?

[42] SD1 testified, and it was not challenged that the slopes were located on private land and not within the JKR's road reserve. Therefore, no monitoring was done as it was outside of JKR's scope and jurisdiction. SD1 was cross-examined that prior to the accident, the trees on the slopes were already a danger to traffic but the witness disagreed because the landslide had caused the trees to fall and not the other way round. He also explained that the landslide caused the electricity poles to fall and not due to the trees falling upon the poles. The effect of SD1's evidence regarding the issue of the private land/property where the trees were located prior to the landslide, although he was not present at the accident site that night, was to negate any liability on the part of the first, second and third defendants. These evidences were not able to be challenged by the plaintiff and therefore the court must give due weight to these facts.

[43] There was also the evidence of SPK1 in Q&A12 of his witness statement wherein he stated that the scope of works under the concession agreement, *ie*, the principal agreement and supplementary agreement did not include any maintenance of trees. They would only do maintenance on slopes if directed by JKR under certain conditions. SPK1 also stated in Q&A11 that TNB owned and maintained the electricity poles and was obligated to ensure the poles did not endanger any road user, including the plaintiff. The third-party was not responsible for any electricity poles as these were public utilities owned by such companies as TNB. If during their rounds, the workers of the third party encountered any erosion on the slopes,

A they would inform JKR who would deal accordingly. SPK1 testified that they did not find any land erosion in that area prior to the accident and if they had found any such incident, they would surely have informed JKR. The maintenance rounds in that area were last done in November, prior to the accident. There were no rounds from 1-5 December 2018 because those
B dates were not in the schedule of is maintenance. He said they would conduct scheduled maintenance at a frequency of once a week.

[44] Nevertheless, SPK1 admitted that the company was responsible for emergency works such as this incident where they needed to respond within one hour after receiving notification of an incident. Therefore, the company
C would only be "liable" if it arrived later than one hour after receiving notification and an accident had occurred within that one hour and the company had not yet managed to conduct emergency works. In this case, the company received notification about the landslide at 7.50pm from JKR that evening and immediately sent a team to survey the area and brought its
D machineries to clear the debris. Their team arrived within one hour of the notification. These facts were not challenged. All clearing works were completed within 24 hours of the landslide.

[45] Evidence was established that the third party had signed a principal agreement with the State Government on 14 March 2013 and later a
E supplementary agreement on 15 December 2015 to vary the terms and conditions of the principal agreement. The principal agreement was for the routine maintenance works and asset management services in respect of protocol roads and major roads in the State of Perak. Scope of works for emergency works was as per cl. 3.3 of the principal agreement. Obviously,
F the third party's evidence was to minimise its role and instead the defendants played a bigger role because everything that its servants did was within the scope of the concession agreement (including the supplementary agreement).

[46] This court opined that based on these evidences, the plaintiff had not proved on a balance of probabilities the elements for negligence, that is the
G defendants and the third party owed him a duty of care and neither had they breached their duty of care. I found that the plaintiff could not establish a nexus or special relationship with the defendants and the third party such that would give rise to a duty of care towards him. Instead, I found that it was more probable than not that, if any, the local council (local authority,
H *ie*, Majlis Daerah) and the private landowners of the land adjacent to the said road should have been named as the defendants in this case. In this regard, I agreed with the learned Magistrate when he raised the issues of who were responsible for the fallen trees and adjacent land. He had concluded that the plaintiff was unable to prove the exact location of the accident site. However,
I I found there was evidence from SD1 that they had conducted a search with the land office and had determined the three owners of the land adjacent to the said road where the landslide and accident happened.

[47] The plaintiff submitted that the defendants were liable under s. 7 of the Government Proceedings Act 1956 and therefore could not claim immunity from suit. Section 7 provides:

> Savings of acts done in exercise of public duties
>
> 7. (1) Notwithstanding any other provisions of this Act to the contrary no proceedings, other than proceedings for breach of contract, shall lie against the Government on account of anything done or omitted to be done or refused to be done by the Government or any public officer in exercise of the public duties of the Government.
>
> (2) For the purposes of subsection (1) the expression "exercise of the public duties" includes:
>
> (a) the construction, maintenance, diversion and abandonment of railways,
>
> roads, bridle-paths or bridges;
>
> (b) the construction, maintenance and abandonment of schools, hospitals or other public buildings;
>
> (c) the construction, maintenance and abandonment of drainage, flood prevention and reclamation works; and
>
> (d) the maintenance, diversion and abandonment of the channels of rivers and waterway.
>
> (3) Nothing in this section shall prevent the bringing of any suit for damages or compensation arising out of negligence or trespass in the execution of any works of construction or maintenance undertaken by the Government in the exercise of the said public duties.
>
> (4) Nothing in this Act shall subject the Government, in its capacity as a highway authority, to any greater liability than that to which a local authority is subject in that capacity.

[48] However, pursuant to the above, the court has considered whether the authority here has assumed responsibility to protect its infrastructure users from harm when using the public road, or whether it has "created" any dangers from the management and maintenance of the said road: *Gorringe*'s case (*supra*). A highway authority may not be liable in a tort action to its users so long as the authority did not create the tort itself and in the same manner, I am of the view that the same could be said of an authority such as JKR as the plaintiff has not been shown that JKR had created a tort on 4 December 2018 which caused the plaintiff to suffer injuries and damages.

[49] The biggest "danger" on the said road that day, in my view, was the fallen electricity poles. The plaintiff himself agreed and submitted that the power lines were still live. The question to be asked then, was it the

responsibility of the third party tasked with the duty to maintain the road to cut the power supply? The obvious answer is a resounding "No"! TNB is responsible to cut the power supply to the fallen electricity poles. Only then can the third party commence its task to clear the road of fallen trees and debris, and the same goes for the CDD and Bomba. How can the plaintiff cast the blame on the defendants to be responsible for the accident that befell him then, wherein the danger was due to natural causes. It was an undisputed fact that it was raining that night, there was a landslide and some trees as well as a few electricity poles had fallen onto the said road causing a blockade of sorts.

[50] In support of the plaintiff's contention that s. 7 of the Government Proceedings Act 1956 was applicable in his case, he relied on the case of *Raymond Cheah Choon Sing v. Jurutera Daerah, Jabatan Kerja Raya Seberang Perai Tengah & Ors* [2017] 9 CLJ 543; [2018] 1 MLJ 362. The facts of the case and the decision of the Court of Appeal were as follows:

> On 2 September 2009, *the appellant was riding his motorcycle along Jalan Perusahaan, Bukit Minyak, Pulau Pinang when he suddenly fell into two contiguous potholes.* The appellant was thrown off his motorcycle and sustained injuries. The appellant then filed a claim against the respondents but the claim was dismissed by the magistrate. The appellant's appeal to the High Court was also dismissed by the learned judicial commissioner ('the JC'). The learned JC found that: (a) the appellant failed to prove that the respondents were negligent within the perimeters of s. 7(3) of the Government Proceedings Act 1956 ('the Act'); and (b) the respondents were protected under s. 7(1) of the Act for any omission or refusal to maintain the road which was in a state of disrepair due to the two potholes. Aggrieved by the decision, the appellant filed the present appeal. The issue for the court's determination was whether the respondents were liable in negligence for their failure to keep a road known as Jalan Perusahaan which was under their maintenance in good repair pursuant to s. 7(3) of the Act.
>
> Held, allowing the appeal with costs:
>
> ...
>
> (2) In the present case, the action by the appellant against the respondents was for negligence and not for breach of contract. The respondent could not rely on s. 7(1) of the Act to argue that no proceedings should lay against them on account of their act or omission in the exercise of their public duties (see para 18).
>
> (3) On a plain reading of s. 7(3) of the Act, it was clear that the words 'construction' and 'maintenance' contained in the phrase 'in the execution of any works of construction or maintenance' was disjunctive. Further, the maintenance of public roads included the regular inspection of public roads and the act of carrying out timeous and prompt repair and maintenance works to keep the public roads in good repair and condition.

It followed that where as in this case, notwithstanding the respondents' knowledge of the existence of the potholes the respondents failed to promptly repair the potholes and thereby left the public road in a state of disrepair. As such, the respondents in failing to maintain the public road in question had failed to discharge their statutory duty under s. 7(2) of the Act (see paras 21 & 23).

(4) The first requirement of the tort of negligence was the existence in law of a duty of care situation, *ie*, one in which the law attached liability to carelessness. This requirement had been clearly satisfied pursuant to ss. 5 and 7(2) of the Act which imposed a statutory duty of care on the respondents. The second requirement was that there must be careless behaviour by the respondents. The third requirement was that there must be a causal connection between the respondents' careless conduct or neglect and the damage. And the fourth requirement was the element of foreseeability that such conduct or neglect would have inflicted on the appellant the kind of damage of where he complained. The second to the fourth requirements were questions of fact, which on the undisputed facts and evidence were satisfied on the balance of probabilities. In totality, the respondents were negligent in failing to carry out timeous repair to the potholes despite having prior knowledge of the same, and which said act of neglect led to the appellant falling into the potholes and thereby sustained loss and damage (see paras 29-30).

...

[16] The word 'neglect' is defined as 'fail to give proper care or attention to' or 'fail to so something' (*Concise Oxford English Dictionar*y (11th Ed) Revised 2008). We are of the view that on the true construction of s. 5 and sub-s. 7(3), the liability of the government for any 'neglect' by any public officer under s. 5 should be read in conjunction with sub-s 7(3) which provides for the bringing of any action for damages arising out of negligence.

...

[26] We will now advert to the cases cited by learned SLA for the defendants. *Goodes v. East Sussex CC* and *Gorringe v. Calderdale Metropolitan Borough Council* are distinguishable on the facts. In *Goodes*, the plaintiff's car skidded on a patch of black ice. He claimed damages against the defendant highway authority, contending that the authority ought to have prevented the formation of ice by gritting the road and that its failure to do so constituted a breach of its duty under s. 41(1) of the Highways Act 1980 to 'maintain the highway'. The House of Lords held that on the true construction of s. 41(1) of the Act, a highway authority's duty to maintain the highway did not extend to keeping it free from ice. *In Gorringe, the plaintiff suffered serious injury driving a motor car on a country road when, just short of a crest in the road, she braked sharply and skidded into the path of a bus coming from the opposite direction. The plaintiff argued that the authority's failure to place on or near the road sufficient signs giving warning to motorists that they were approaching a dangerous part of the road constituted a breach of its duty*

as highway authority under s. 41(1) of the Act to 'maintain the highway'. The House of Lords held that the duty to 'maintain the highway' did not include a duty to take reasonable care to secure that the highway was not dangerous to traffic. Further the accident had not been caused by any defect on the state of repair of the road or by any failure of the authority to maintain the road. It was also held that the existence of the broad public duty under the Highway Act 1980 did not generate a common law duty of care and thus a private right of action.

[27] In *Thompson v. Bradford Corporation & Anor*, the plaintiff was entitled to damages for negligence against the corporation because turning part of the footpath into a roadway was equivalent to making it into a new road and the failure of the corporation to see that the road was fit for the traffic intended to use it was an act of misfeasance and not nonfeasance. In *Moul v. Croydon Corporation & Anor*, the defendants were held not liable as the lack of repair of the road arose from nonfeasance and not from misfeasance. In *Burton v. West Suffolk County Council*, the defendants were held not liable because: (i) the fact that the drainage work was done by the defendants was inadequate was not misfeasance on their part; and (ii) there was no duty on the defendants to give [2018] 1 MLJ 362 at 374 warning of ice on the road. In *Wilson v. Kingston-Upon-Thames Corporation*, the court held that the lack of repair of the highway arose from nonfeasance and not from misfeasance in repairing the road negligently, and therefore, the highway authority were not liable.

[28] In our view, the above-mentioned cases cited by learned SLA the English courts relied on the common law principle in *McClelland* which we have said are not applicable in the light of the GPA 1956. As such, the cases are distinguishable on the facts and the law. Firstly, there is no equipollent ss. 5, 7(2) and 7(3) of the GPA 1956 in the English cases which specifically provides that a claim for damages for negligence may be brought against the defendants. Secondly, the distinction between misfeasance and nonfeasance is not applicable in this case. As such, the cases are of no aid to the defendants' case. (emphasis added)

[51] With due respect, I am of the view that the case above could be distinguished on the facts as there were potholes on the road and the defendants were the right party to be sued in court for the damages suffered by the plaintiff. The undisputed facts in the present case were that a landslide occurred and the trees on the hillslopes adjacent to the land had fallen onto the road causing a blockade. The plaintiff claimed that he hit broken electricity poles caused by the fallen trees. But no one actually testified for sure that the electric poles were brought down by the fallen trees *per se* or by the landslide. I refer to *Malaysian Tort Law, Sweet & Maxwell* (2019, Wan Azlan Ahmad & Mohsin Hingun), the authors stated:

35 Dangers from land adjoining highways

Liability for nuisance may also come into being from dangers originating from lands adjoining highways. Where a danger is not from natural causes, liability for nuisance may arise irrespective of whether the

defendant knew or ought to know of the danger; *and as for the dangers which are from natural causes, laibility is dependent on whether the person responsible for the land actually knows of it, or that he ought to have known of it.* (emphasis added)

[52] Some of the cases referred to by the authors were *British Road Services Ltd v. Slater* [1964] 1 All ER 816; *Len Omnibus Co Bhd v. North South Transport Sdn Bhd & Anor And Another Appeal* [1978] CLJU 96; [1978] 1 LNS 96; [1978] 2 MLJ 246; *Batang Kali Estates Sdn Bhd v. Romani Abdul Aziz* [1995] 3 CLJ 836; [1995] 3 MLJ 104, HC. In particular, I refer to Justice KC Vohrah's decision in the *Batang Kali Estates* case (*supra*) where the facts of that case were similar to the present case, except there was a fatality in the former, as follows:

The respondent's husband ('the deceased') died in an accident and she sued the appellantfor damages in a dependency claim under s. 7 of the Civil Law Act 1956. The appellant owned a rubber estate along the Ulu Yam Bharu-Batang Kali Road. *On the night of 30 August 1985, a motorcycle was found lying on the right hand side of the road in the direction of Batang Kali. The rider of the motorcycle was the deceased who suffered from multiple fractures of the ribs. He died of haemorrhagic shock on the same day. The respondent alleged that a rubber tree belonging to the appellant fell on the deceased, or alternatively, that the deceased had collided into the tree which had fallen onto the road and obstructed the deceased's lawful and proper path. The respondent alleged that the accident was caused solely by the negligence of the appellant and/or its servants or agents in the supervision and maintenance of the rubber tree and that the tree fell because it was diseased. The respondent also alleged nuisance on the appellant's part for continuously allowing the fallen tree to remain on the road, thereby constituting a potential danger to road-users. The appellant however, contended that the tree fell because of strong winds during a storm.* The magistrate held that the appellant was wholly liable. The appellant has appealed.

Held, allowing the appeal:

(1) The onus of proof is always on the plaintiff to show how the accident took place. In this case, nobody saw how the deceased came to be injured. The sketch plan showed that the tree fell on the left side of the road, thereby obstructing only half of the right side of the road, and the deceased could have passed through the gap.

(2) The respondent had failed to adduce any evidence that the tree was diseased or suffering from some defect. Before the issue of the appellant's negligence or the question whether it had taken steps to inspect the trees in the estate would arise, it had first to be proved that the tree was diseased or defective.

(3) There was no proof that the tree was in a decayed state and therefore, the issue of it posing a danger and the issue of knowledge of its diseased state did not arise. Also, the evidence would tend to show that a storm had taken place just before the accident and

A the appellant's assistant estate manager had promptly taken steps to clear the road about half an hour later. Therefore, the tort of nuisance was not made out in respect of the obstruction caused by the tree.

...

B Nobody, however, saw how the deceased came to be injured although there is no dispute that he was travelling on that road towards Ulu Yam Bharu. The police sergeant (SP2) who went to the scene that night at about 8pm said, that he saw a tree on the left side of the road (as one faces Batang Kali) had fallen across the road. He said that the branches lying in the centre of the road had been cut and pushed aside to the right.
C The sketch plan (see D2) which he drew showed that a tree was lying from beyond the left side of the left sidetable of the road across the side table with part of the crown of the tree protruding slightly over to the right side of the road. His evidence showed that the roots of the tree were about 5-6ft away from the inner edge of the left sidetable. The sketch plan
D showed a greater part of the left side and all of the right side of the road to be free from obstruction. The motorcycle was shown to be on the right sidetable, some distance below the level of the fallen tree.

It has to be noted that the sergeant went to the scene at about 8pm and that the assistant manager (SD1) of the defendant company was there earlier (at about 7.30pm) after he had been informed at 7pm that a tree
E had fallen. And SD1 had instructed his men to clear up the road ...

What also has to be noted is that both SP2 and SD1 were of the view that the tree fell because of a storm.

Thus, on the evidence adduced, it was quite correct for the magistrate to observe that
F *nobody saw the accident. She also said that it is not known whether the deceased was crushed by the tree while he was riding along that place or that he had collided into the fallen tree.* She, however, did not consider the available evidence that although the tree obstructed the road it did not wholly do so as there was a gap of some 4-5ft (more than half of the deceased's side of the road) which the deceased could have passed through assuming he was
G not crushed by the tree falling on him or he had not collided into it. *The point is that the onus of proof is always on the plaintiff to show how the accident took place. The doctor who drew the post-mortem examination report could have thrown light from the nature of the crush injuries suffered by the deceased as to how the accident had occured if he had been called to give evidence.*

H *However, even assuming that the tree was the cause of the accident, was the defendant company negligent as claimed by the plaintiff? In the first place, it has to be proved that the tree was diseased.* The assistant manager of the defendant company (SD1) categorically denied that the tree was diseased – he testified that there was a thunderstorm that evening, that it was raining heavily and that the tree fell because of heavy wind. *His evidence of the thunderstorm was*
I *borne out by the investigating officer who testified that before he went to the scene there had been heavy rain and wind and that the tree probably fell because of the strong wind.*

In this case, the magistrate was left with no evidence whatsoever that the tree was diseased and that it fell because it was diseased. The plaintiff failed to produce any such evidence unlike the plaintiff in the case of *Cunliffe v. Banks* [1945] 1 All ER 459 (see pp 460-462 where detailed evidence of the diseased state of a fallen tree was reviewed) and unlike in *Thean Chew v. Seaport (Selangor) Rubber Estate Ltd* [1960] MLJ 166 (see pp 166 to 167 where again detailed evidence relating to the diseased state of a fallen tree was examined).

...

Moving away from the tort of negligence to the tort of nuisance, the plaintiff claimed (see para 5 of the statement of claim) that the defendant or its servants or agents 'continuously allowed the said rubber tree to remain in a decayed condition near to the road and/or alternately permitted the fallen rubber tree to be planted too close to the road and thereby failed to anticipate that if there was a heavy rainfall or thunderstorm as has been alleged, the proximity of the trees to the road was a potential forseeable danger and/or in the alternative, continuously allowed the fallen tree to remain on the said road and had thereby constituted a potential danger to persons lawfully using the same. By reason of the matters aforesaid, the defendants caused or alternatively adopted thesaid nuisance'. Here again, we come back to the absence of proof that the tree was in a decayed state as claimed in the pleading ...

Just one other matter, with regard to para. 5 of the statement of claim as far as the claim of nuisance is concerned. There is an allegation that the defendant continuously allowed the fallen tree to remain on the said road and that it thereby constituted a potential danger to persons using the road. As was adverted to earlier, the assistant manager (SD1) of the rubber estate of the defendant was at the accident scene at about 7.30pm after he had been informed half an hour earlier that a tree had fallen and he took steps to clear the road. The evidence would tend to show that the storm had taken place just before the accident and I cannot see the tort of nuisance being made out in respect of the obstruction caused by the tree. It is illuminating to refer to what Raja Azlan Shah Ag CJ (Malaya) stated in *Len Omnibus Co Ltd Bhd v. North South Transport Sdn Bhd* (at p. 249):

> *That is a proposition which I refuse to accept. If a tree adjoining a highway falls on the road without any negligence on the part of its owner, and the said tree causes an obstruction to the said highway, it is wrong to suppose that ipso facto and immediately a nuisance is created. The keynote of his responsibility is knowledge or means of knowledge. Thus, a nuisance will obviously be created if, knowing or having the means of knowing of its existence, he allows it to continue for an unreasonable time or in unreasonable circumstances, but the mere fact that an obstruction has come into existence cannot overnight turn it into a nuisance. Each case must be examined whether or not a nuisance is created. If that were not so, it would seem that every landowner who owns trees adjoining a highway would be turned into an insurer. That in my opinion, would run contrary to the recognized law on the question of nuisance to highways.*

A In all the circumstances, my view was that the magistrate was wrong in finding the defendant company liable and I allowed the appeal of the defendant's company with costs. (emphasis added)

[53] This court is guided by the decision above which in my view is wholly relevant to the present case. It is noted that the learned High Court Judge did B not point out that the wrong party had been sued in that case because the plaintiff rightly had pursued her claim against the owner of the land adjacent to where the accident occurred.

[54] I also refer to a case which was heavily relied upon by the plaintiff in his submission in support of his case, *Ahmad Jaafar Abdul Latiff v. Dato' Bandar* C *Kuala Lumpur* [2014] 9 CLJ 861; [2014] MLJU 1913. I found that the respondent in that case was a local authority, *ie*, Dato' Bandar Kuala Lumpur (a local council/authority) and not Jurutera Daerah of Kuala Lumpur. This is the first distinction to be made with the present case; although the facts and the *ratio decidendi* in fact, I found, supported the defendants' case.

D **[55]** The counsel for the plaintiff relied heavily on this case in support of his contention that the defendants were liable and stated in para. 66 of his written submissions that the COA held the Dato' Bandar Kuala Lumpur was liable. However, with respect, I beg to differ as this was not what was held in that case. I have reproduced below the relevant parts of that is case and E the Federal Court in fact agreed with the Court of Appeal that the appellant had failed to prove his case on a balance of probabilities, as follows:

Background Facts

[3] It was not in dispute that on 2nd October 2000 at about 5 p.m. the Appellant F *was driving his car, a Proton Perdana bearing registration number KHJ 2676 along Jalan Duta, Kuala Lumpur on the left side of the road. He was about 150 meters away from the junction to Damansara Heights where his office, Shell Malaysia Trading Sdn. Bhd. was located. Suddenly a tree ('the tree') fell on his car. The Appellant was severely injured and his car was damaged as well. The tree that fell was on a private land.*

G [4] Due to the injuries he sustained and the damage to his car the Appellant commenced an action against the Respondent for breach of duty and negligence.

Before The High Court

H [5] It was the case for the Appellant that the Respondent had breached its statutory duty under section 101 of the Act. It was asserted that the Respondent was tasked under the Act to oversee all trees in the city irrespective of where they were located.

[6] The Appellant contended that the duty of the Respondent included the responsibility of ensuring that all trees were properly trimmed or I removed once they posed a danger to the public. The Respondent would be made liable if it failed to carry out the duty and if such danger resulted in an accident.

[7] As regards the element of danger to the public the Appellant relied on the doctrine of *res ipsa loquitor* ('the doctrine') thereby shifting the burden to the Respondent to rebut otherwise.

[8] In response to the claim of the Appellant the Respondent argued that the Appellant had failed to establish the precise location of the tree that injured and caused damage to him. As such the Appellant could not allege that the tree had posed a danger to the public.

[9] Further, the Respondent submitted that since the tree was located on a private land the doctrine could not be invoked in favour of the Appellant.

[10] In his judgment the learned trial Judge did not expressly rely on the doctrine to find that the Appellant had discharged the burden of proof for his claim.

[11] The learned trial Judge went on to hold that the duty of the Respondent extended to trees on private land and as such he did not consider the location of the trees as crucial in coming to his finding.

[12] And in finding that the Appellant had established that the tree was a danger to the public the learned trial Judge premised his conclusion on the following facts, *inter alia*:

i. that the tree was 25 meters tall and without leaves; and

ii. that the tree was on a slope.

Before the Court of Appeal

[19] It was further held that even if the exact location of the tree was not critical the learned trial Judge erred in finding the tree posed a danger to the public because it was without leaves and fell from a slope. *The Court of Appeal held that not every tree located on a slope would pose a danger to the public without any evidence on the gradient and soil structure of the slope.*

[20] The Court of Appeal acknowledged that at the time and place of accident the wind was very strong and raining heavily as well. It was also noted that the tree was without leaves and of Batai specie. The Court of Appeal therefore opined that the Appellant should have called an expert to give an opinion whether a tree of Batai Specie without leaves would normally be diseased.

Such view was expressed because the learned trial Judge seemed to have implied that all Batai trees without leaves located along Jalan Duta posed a danger to the public and ought to be removed. The Court of Appeal therefore held that without such expert evidence the irresistible conclusion would be that the Appellant failed "to discharge the burden of proving"that the Respondent was in breach of its duty of care. Failing to notice 'a tree without leaves standing upright in the midst of the lush green of Jalan Duta' could not result in the transfer of the burden of proving that the tree posed a danger to the public.

...

A Findings

[29] In considering this appeal I bear in mind the question posed before me, namely, 'To what extent do the powers conferred under Section 101(b) and (cc) of the Local Government Act 1976 confer a duty of care on the local authority.'

B [30] Section 101 (b) and (cc) of the Act reads:

> 101. In addition to any other powers conferred upon it by this Act or by any other written law a local authority shall have power to do all or any of the following things, namely -
>
> C (b) to plant, trim or remove trees;
>
> (cc) to *require the owner or occupier of any* premises to do any of the following acts: (i) *to remove, lower or trim to the satisfaction of the local authority any tree,* shrub or hedge overhanging or interfering in any way with the traffic on any road or street or with any wires or works of the local authority or *which in the pinion of the local authority* D *is likely to endanger the public safety* or convenience and in the event of *any tree situated in private premises falling across any public road or street* the local authority may remove the fallen tree and the expenses incurred shall be charged on and recoverable from the owner or occupier thereof; (ii) to remove any dilapidated fence or structure abutting upon any public place and *if such owner or occupier* E *fails to comply* with any such request any authorized officer of the local authority may enter upon the said premises and carry out such work and section 115 *shall apply to the expenses incurred thereby.*

[31] The foregoing statutory provisions are clear on the statutory obligations of a local authority of which the Respondent is one. Section F 101(b) stipulates a direct duty for a local authority 'to plant, trim or remove trees'. Meanwhile, section 101(cc) authorizes, inter alia, a local authority to require an owner or occupier of premises 'to remove, lower or trim to the satisfaction of the local authority any tree, shrub or hedge overhanging or interfering in any way with the traffic on any road or street or with any wires or works of the local authority or which in the opinion G of the local authority is likely to endanger the public safety'. In the event of the owner or occupier of the premises failing to comply with the request by the local authority 'any authorized officer of the local authority may enter upon the said premises and carry out such work and section 115 shall apply to the expenses incurred thereby'.

H *[36] With respect, the allegation invites an examination of the factual situation and since it is the Appellant who is making it the burden falls upon him to establish it on the balance of probability. (See: Section 101 Evidence Act 1950; Majlis Perbandaran Ampang Jaya v. Steven Phoa Cheng Loon & Ors [2006] 2 MLJ 389). It must also be borne in mind that 'negligence is a question of fact and not of law, that each case must depend on its own facts'. (See: Ma Clyde v. Wong Ah Mei* I *& Anor [1970] 2 MLJ 183).*

[37] In this case the Appellant relied heavily upon the doctrine of *res ipsa loquitor* to say that the Respondent was negligent. However, the Courts below did not find the doctrine applicable. The learned trial Judge held that the 'burden is certainty on the plaintiff to prove negligence on the part of the defendant or that there was a breach of statutory duty by the same'. The Court of Appeal ruled that the 'absence of expert evidence is understandable because the respondent adopted, with respect, the erroneous position that he was entitled to rely on the doctrine of *res ipsa loquitur*'.

[38] I agree with the findings of the Courts below. The doctrine of res ipsa loquitor did not apply in this case. As such the burden remained with the Appellant to establish negligence and breach of statutory duty by the Respondent.

[39] It was held that the 'fundamental basis of the maxim (*res ipsa loquitor*) is that the rule that it is for the plaintiff to prove negligence and not for the defendant to disprove it, may cause hardship to the plaintiff if it is impossible for him to know what precise acts of omission led to his damage, and this is most obviously so where the cause of the damage is peculiarly within the means of knowledge of the defendant who caused it. This hardship can sometimes be avoided by the application of the maxim *res ipsa loquitur*'. (See: *Ma Clyde v. Wong Ah Mei & Anor (supra)*). It should also be noted that the doctrine is not a rule of substantive law but rather a principle of evidence. The doctrine of *res ipsa loquitur* does not prove negligence. It only infers the negligence. And the doctrine does not apply when a defendant did not have exclusive control over the property or object that alleged to have caused the damage or injury. Indeed it is insufficient for a plaintiff merely to present evidence of defendant's negligence. A plaintiff must show that the type of injury suffered would not ordinarily occur unless the defendant was negligent.

[40] In its judgment the Court of Appeal held that 'the location of the tree is of primary importance since a court of law cannot make a finding of fact that the tree posed a danger to the public when there is insufficient evidence as to the precise location of the tree'?

[41] Bearing in mind my view on the extent of the duties of a local authority under section 101(b) and (cc) and having considered the reasons given by the Court of Appeal in overturning the decision of the learned trial Judge, I find no reason to interfere with the conclusion of the Court of Appeal. I find that the learned trial Judge erroneously came to his conclusion based on some assumptions as highlighted by the Court of Appeal.

Conclusion

[42] Accordingly, I agree with the Court of Appeal that the Appellant failed to prove his case on the balance of probability. Hence this appeal is dismissed. I order no costs in view of the unfortunate situation of the Appellant. Deposit is to be refunded to the Appellant. (emphasis added)

[56] This court is bound by the decision of the Federal Court above as it has not been overturned by any later decisions by the Federal Court on the same issue: *Dalip Bhagwan Singh v. PP* [1997] 4 CLJ 645. Clearly, the plaintiff had misunderstood the decision of the Federal Court in the case of *Ahmad Jaafar* (*supra*) and I found that the principles enunciated in that case were applicable to the situation of the defendants and the third party here. Having said that, I concluded that the defendants could rely on s. 7 of the Government Proceedings Act 1956 to avoid liability, therefore, I also found no merit in this issue raised by the plaintiff.

(iv) Wrong Burden Of Proof Imposed Upon The Plaintiff By Requiring Him To Call An Expert On Soil Condition

[57] To reiterate, the burden of proof in an action for negligence lies with the plaintiff: *Ng Chul Sia v. Maimon Ali* [1982] CLJU 95; [1982] 1 LNS 95; [1983] 1 MLJ 110. The duty of the court is to determine which version is more inherently probable based on available evidence: *Noorianti Zainol Abidin & Ors v. Tang Lei Nge* [1990] 1 CLJ 943; [1990] 1 LNS 545; [1990] 2 MLJ 242.

[58] I refer to the case of *U Television v. Tan Sri Dato' Seri Vincent Tan Chee Yioun* (Appeal No 02-f-12-126 (W)) where the Federal Court stated that technical issues are to be considered by the courts in light of the expert opinion; and that for a witness to be considered an expert witness, he or she must be truly independent and skilled in the area he or she is giving evidence on. The plaintiff in the present case did not call any expert witness to give evidence in respect of the landslide. However, on this issue I refer also to the case of *Ahmad Jaafar* (*supra*) where the Federal Court upheld the decision of the Court of Appeal that "The Court of Appeal therefore held that without such expert evidence the irresistible conclusion would be that the appellant failed "to discharge the burden of proving" that the respondent was in breach of its duty of care." Hence, I did not find any merit in this issue raised by the plaintiff.

(v) Whether The Presumption Of Adverse Inference Was Applicable Against The Defendants

[59] I have included this one last issue raised by the plaintiff and will deal with it just briefly as the law is settled on invoking the presumption of adverse inference under s. 114(g) of the Evidence Act 1950. The plaintiff submitted that the presumption of adverse inference must be invoked against the defendants for witholding or suppressing of evidence for failure to call one Azmi who was present at the site rather than SD1 who was not there on that day. SD1 however told the court that he was instructed by the management of JKR to attend court in respect of the case. The plaintiff left it at that and therefore, SD1's explanation should be accepted by the court as there was nothing sinister about Azmi not being called to testify at the trial.

[60] On this issue, it is essential to appreciate the scope of s. 114(g) lest it be carried too far outside its limit. It is trite law that s. 114(g) of the Evidence Act cannot be simply invoked unless there was suppression of material evidence or the witness is a material witness: *Munusamy Vengadasalam v. PP* [1987] 1 CLJ 250; [1987] CLJ (Rep) 221; [1987] 1 MLJ 492. In the case of *Francis Okechukwu Nwankwo v. PP & Another Appeal* [2022] CLJU 2649; [2022] 1 LNS 2649; [2022] MLJU 2836, the Court of Appeal held that the duty on the prosecution was only to produce in court all witnesses necessary for the unfolding of the narrative. Applying the case law above to the present case, I found that there was no merit on this complaint as well.

[61] The other cases cited by the plaintiff mainly were on the liability of highway authorities and I did not find them of much help and could be distinguished because they involved the issue of obstructions on the highways. I have also referred to earlier in this grounds of judgment the position of the law in respect of liability of highway authorities. In the case of *Parimala Muthusamy & Ors v. Projek Lebuhraya Utara-Selatan* [1997] 4 CLJ 54, a strayed cow on the highway collided with the deceased's car. It was held that there was a breach in the fencing system and the defendant found to be liable for negligence, breach of statutory duty, breach of contract. The area had experienced broken fences but the defendant did not see it fit to take extra measures to avoid such breaches. In the case of *Sajid Dilwarkhan v. Ketua Pengarah Jabatan Kerja Raya & Ors* [2020] CLJU 2188; [2020] 1 LNS 2188, the facts showed that the plaintiff's motorcycle went into a pothole on the road, resulting in him being thrown off and sustaining injuries. These cases were distinguished on the facts.

[62] I agreed with the learned Magistrate that, unfortunately in this case, the wrong parties had been sued. Having considered all the records of appeal, and submissions and case laws submitted, I could not agree with the plaintiff's submissions and found no negligence and/or breach of statutory duty on the part of the defendants and the third-party. Therefore, the decision of the learned Magistrate to dismiss the plaintiff's claim was upheld.

Conclusion

[63] Premised upon the above considerations, the court found that appellate intervention was not justified and accordingly dismissed the appeal with no order as to costs.

Order accordingly.